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SEP 6 1 59 PM '95

September 6, 1995

**MEMORANDUM**

TO: The Commission  
THROUGH: John C. Surina *JCS*  
Staff Director  
FROM: Lawrence M. Noble *LN*  
General Counsel

N. Bradley Litchfield *NBL*  
Associate General Counsel

Jonathan M. Levin *JL*  
Senior Attorney

Subject: Draft AO 1995-29

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for September 14, 1995.

Attachment

**AGENDA ITEM**  
For Meeting of: SEP 14 1995

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3 ADVISORY OPINION 1995-29

4 David W. Syme, Treasurer  
5 Christopher Cox Congressional Committee  
6 P.O. Box 8088-C  
7 Newport Beach, CA 92658

**DRAFT**

8 Dear Mr. Syme:

9 This responds to your letters dated July 13 and August  
10 9, 1995, requesting an advisory opinion on behalf of the  
11 Christopher Cox Congressional Committee ("the Cox Committee")  
12 concerning the application of the Federal Election Campaign  
13 Act of 1971, as amended ("the Act"), and Commission  
14 regulations to the disbursement of contribution funds to the  
15 court-appointed receiver of the contributor's companies.

16 The Cox Committee is the principal campaign committee of  
17 Representative Christopher Cox of California. In 1988 and  
18 1990, the Cox Committee received a total of \$2,000 in  
19 contributions from William E. Cooper.<sup>1/</sup> In 1994, Mr. Cooper  
20 and two other owners of the First Pension Corporation pled  
21 guilty to defrauding thousands of investors. A Federal  
22 District Court Judge appointed a receiver to oversee  
23 companies affiliated with First Pension and recover assets  
24 for the benefit of the defrauded investors.

25 On June 7, 1995, the First Pension Ad Hoc Investors'  
26 Committee ("Investors"), a committee formed to work with the  
27 defrauded investors, sent a letter to Mr. Cox. The letter  
28 briefly describes Investors and explains that it and other

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1/ According to the materials you submitted and disclosure  
reports filed by the Cox Committee, Mr. Cooper contributed  
\$500 for the 1988 general election, \$500 for the 1990 primary  
election, and \$1,000 for the 1990 general election.

investors are working closely with the receiver. Investors informed Mr. Cox of Mr. Cooper's unlawful activities and explained that, at a meeting of several hundred investors, a decision was made to contact the congressman because of Mr. Cooper's contributions to his campaign during the time of the fraudulent activities. Investors stated that it believed the contributions were paid with money stolen from investors, and requested that Mr. Cox "return [to the receiver] all contributions which came from Mr. Cooper or any of his related entities."<sup>2/</sup> You state that Investors does not contest that the contributions were made from Mr. Cooper's personal checking account.

You ask if the Cox Committee may accede to the request of Investors and "refund" the contributions to the receiver, rather than the donor. You note that neither Mr. Cox, members of his family, persons employed by the congressman, nor any persons sharing an ownership interest with him in any business or investment within the past three years "stands to receive any funds that might be distributed by the receiver."

As you note, the amounts you propose to have the Cox Committee disburse will be sent to receiver and not to Mr. Cooper himself. The receiver is the manager of entities or assets that were owned in part or controlled by Mr. Cooper, and must control the assets in the same manner as the owner would be bound to do if he were in possession. 28 U.S.C.

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<sup>2/</sup> The letter asks Mr. Cox to contact the receiver if there are any questions; it appears, therefore, that this request was made with the approval of the receiver.

3 §959(b). Nevertheless, the receiver is an officer of the  
4 court and is not an agent or employee of any particular party  
5 to the litigation in which he was appointed. See United  
6 States v. Smallwood, 443 F.2d 535, 539 (8th Cir. 1971).

7 Instead, he or she "stands in the position of a  
8 representative and a protector of the interest of creditors,  
9 shareholders, depositors, and others, in the property in  
10 receivership." 65 Am. Jur. 2d Receivers §139 (1972). In  
11 addition, the disbursement of these funds is not mandated as  
12 a refund or return of contributions that are excessive or  
13 unlawful under the Act. Based on these factors, the  
14 Commission does not characterize the proposed disbursement by  
15 the Cox Committee as a "refund" to the contributor.<sup>3/</sup>

16 The Commission, instead, examines these proposed  
17 disbursements with respect to the rules on permissible use of  
18 the Cox Committee's funds. The Act and Commission  
19 regulations provide that the candidate or his campaign  
20 committee may use excess campaign funds for a number of  
21 listed purposes and for any lawful purpose, but may not  
22 convert such funds to the personal use of the candidate or  
23 any other person. 2 U.S.C. §439a; 11 CFR 113.2(d). Although

24 <sup>3/</sup> The Commission notes that another factor to consider is  
25 the length of time that has elapsed between the making of the  
26 contributions and the proposed disbursement of equivalent  
27 funds. The fact that the contributions were made five to  
28 seven years ago does not, by itself, preclude a disbursement  
29 by a political committee from being classified as a refund.  
30 Nevertheless, a request for a "refund" from a candidate's  
committee by someone who contributed several years previously  
may necessitate scrutiny under 2 U.S.C. §439a and 11 CFR  
113.2 as to the purposes of the request.

3 no specific use of campaign funds discussed in the Commission  
4 regulations on personal use is applicable in this situation,  
5 the regulations define "personal use" generally as "any use  
6 of funds in a campaign account of a present or former  
7 candidate to fulfill a commitment, obligation or expense of  
8 any person that would exist irrespective of the candidate's  
9 campaign or duties as a Federal officeholder." 11 CFR  
10 113.1(g). Where a specific use is not listed as personal  
11 use, the Commission makes a determination on a case-by-case  
12 basis. 11 CFR 113.1(g)(1)(ii).

13 In explaining the application of the case-by-case  
14 approach, the Commission

15 reaffirm[ed] its long-standing opinion that  
16 candidates have wide discretion over the use of  
17 campaign funds. If the candidate can reasonably  
18 show that the expenses at issue resulted from  
19 campaign or officeholder activities, the Commission  
20 will not consider the use to be personal use.

21 Commission Regulations on Personal Use of Campaign Funds,  
22 Explanation and Justification, 60 Fed. Reg. 7862, 7867  
23 (February 9, 1995).

24 The request by Investors for the disbursement of funds  
25 stems from the fact that Mr. Cooper contributed an equivalent  
26 amount to the Cox Committee. Were it not for Mr. Cox's past  
27 campaign activities, i.e., the acceptance of contributions  
28 from Mr. Cooper, Investors' request for the equivalent of  
29 these funds would not have been made. See Advisory Opinion  
30 1995-23.

The Commission notes your stipulation of the fact that  
your family members or those associated with you will not

3 receive any funds distributed by the receiver. The  
4 Commission must also address the personal use of the funds by  
5 others.

6 Although the funds would be used to satisfy Mr. Cooper's  
7 obligations to the defrauded investors and eventually would  
8 be available for personal use by those investors, the  
9 Commission does not view the disbursement as being for  
10 anyone's personal use under the circumstances presented.  
11 The Commission acknowledges that there appears to be no legal  
12 mandate or court order that the Cox Committee make the  
13 requested disbursement. Nevertheless, a request is being  
14 made by persons acting in concert with a court-appointed  
15 officer, and the disbursement would be made pursuant to a  
16 court-supervised recovery of assets that should not have been  
17 made available to the contributor. A small amount of those  
18 funds reached the Cox Committee, and the proposed  
19 disbursement would be made to satisfy the purposes of that  
20 court-supervised process.<sup>4/</sup> The use of the funds to pay Mr.  
21 Cooper's obligations to the investors and the ultimate use by  
22 the investors are therefore secondary outcomes for the  
23 purposes of the personal use prohibition. In principle, it  
24 is the same use as occurs with any lawful disbursement by a

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25 <sup>4/</sup> This situation is therefore distinguishable from one in  
26 which an individual has won a judgment against someone who  
27 contributed to a candidate's committee, and the judgment  
28 creditor seeks funds from the committee. In the latter  
29 situation, neither a court nor anyone acting in a  
30 court-appointed capacity is requesting that the committee  
make a disbursement.

3 political committee once it is received by the payee; e.g.,  
4 from the profits earned by a committee vendor or the salary  
5 drawn by a committee employee.

6 Based on the foregoing, the Commission concludes, that  
7 under the particular circumstances you present, the Cox  
8 Committee may disburse the \$2,000 to the receiver. The  
9 Commission notes that the Act and Commission regulations do  
10 not obligate you to make this disbursement.

11 The Cox Committee should report the disbursement to the  
12 receiver under the category of "Other Disbursements." 11 CFR  
13 104.3(b)(2)(vi)(A). Since the disbursement will exceed \$200,  
14 it should be itemized with a disclosure of the recipient  
15 (i.e., the receiver), the date, the amount, and the purpose.  
16 You should state the purpose with a short explanation in  
17 which you make a reference to this Advisory Opinion. 11 CFR  
18 104.3(b)(4)(vi).

19 The Commission expresses no opinion as to the  
20 application of the rules of the House of Representatives to  
21 your proposal, nor as to any tax ramifications, since those  
22 issues are outside the Commission's jurisdiction.

23 This response constitutes an advisory opinion concerning  
24 application of the Act, or regulations prescribed by the  
25 Commission, to the specific transaction or activity set forth  
26 in your request. See 2 U.S.C. §437f.

27 Sincerely,

28 Danny L. McDonald  
29 Chairman

30 Enclosure (AO 1995-23)